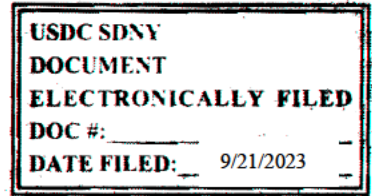


**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**



-----X
DARRYL JOHNSON,

Petitioner,

22-CV-10754 (JLR)(SN)

-against-

ORDER

M. CAPRA,

Respondent.

-----X
SARAH NETBURN, United States Magistrate Judge:

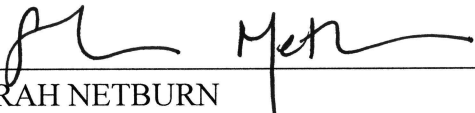
On September 19, 2023, Petitioner filed a letter “seeking this Court’s authorization in filing a C.P.L. 440.10 motion to preserve an issue on my Habeas Corpus Petition.” ECF No. 29. Although Petitioner does not identify the issue he seeks to preserve, Respondent’s brief in opposition to the petition argues that Petitioner failed to exhaust his ineffective assistance of counsel claim. See Resp. Br. at 37-40. Respondent notes that while this claim is unexhausted, it is not procedurally barred because of the availability of a § 440.10 motion. Id. at 39.

The Court interprets Petitioner’s letter as requesting a stay of this proceeding to allow him to return to state court to exhaust his ineffective assistance of counsel claims. It appears that Petitioner raised this issue on direct appeal, which was the wrong forum, so the Court finds good cause to allow him to raise this issue in the correct forum, and, at this stage, the Court cannot conclude that the claim is plainly meritless. Rhines v. Weber, 544 U.S. 269, 277 (2005) (finding the stay and abeyance of a habeas petition is appropriate when there is “good cause for the petitioner’s failure to exhaust his claims first in state court” and where the claims are not plainly meritless).

Accordingly, the motion is GRANTED. This matter is stayed, and Petitioner's habeas petition shall be held in abeyance so that he can exhaust his claims in state court.

Petitioner is ordered to file a letter with the Court within 30 days of a final decision on his CPL § 440.10 motion to vacate the state court judgment.

SO ORDERED.



SARAH NETBURN
United States Magistrate Judge

DATED: September 21, 2023
New York, New York